Supreme Court, U.S.
FILED

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No. _____

IN THE

Supreme Court of the United States

DALLAS COX,

Petitioner,

v.

STATE OF MISSOURI

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Missouri

PETITION FOR WRIT OF CERTIORARI

ERIC E. VERNON
BALDWIN & VERNON
11E.KANSAS
LIBERTY, MO 64068
Eric@bvalaw.net
(816) 842-1102

Counsel for Petitioner

QUESTIONS PRESENTED

This court has established standards for upholding trial courts which make 14th Amendment Due Process findings that evidence destroyed by the state in criminal prosecutions is "merely potentially exculpatory" in *Illinois v. Fisher*, 540 U.S. 544, and, *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333 (1988). This case presents an important question regarding the circumstances in which the trial court has the authority to make the finding that evidence is "materially exculpatory" as opposed to "merely potentially exculpatory," and what constitutes "bad faith".

1. When evidence is intentionally destroyed by the state, may a trial court find, for due process purposes, that the destroyed evidence, given the totality of the circumstances of the case, is materially exculpatory - without independent proof that it was exonerating?
2. When evidence is intentionally destroyed by the state, does "bad faith" require a finding of malicious intent, or may it be inferred from the circumstances?

This case also presents an opportunity to address Justice Stevens' unresolved concerns about due process jurisprudence in cases where the prosecution destroys evidence important to the defense. In both *Illinois v. Fisher*, 540 U.S. 544, and, *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333 (1988)

Justice Stevens offered concurring opinions, predicting that the court would one day face a case "in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." *Id*, at 61 (STEVENS, J., concurring in judgment). Petitioner Dallas Cox, the criminal defendant in the lower case, submits that if the court does not see fit to uphold the trial court's determination that the destroyed evidence was in fact materially exculpatory, this is the case Justice Stevens twice presaged.

3. Is this the case that Justice Stevens presaged, wherein the destroyed evidence though arguably less than exonerating, was so critical to the defense in the circumstances of the case that the destruction of the evidence would make, in the determination of the trial court, any trial of the case *fundamentally unfair* to the defendant, thus authorizing dismissal?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in court below.

The Petitioner here and in the United States Court of Appeals for the Western District of Missouri is Dallas Cox, a citizen of the United States of America.

The Respondent here and in the United States Court of Appeals for the Western District of Missouri is the State of Missouri

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dallas Cox prays that a writ of certiorari will issue to review the judgment of the courts below, which overturned the judgment of the trial court granting on due process grounds a dismissal of his criminal prosecution for a crime he did not commit.

OPINIONS BELOW

The judgment of the trial court, Division IV of the Fifth Judicial Circuit of Missouri, at Saint Joseph in Buchanan County, is unpublished, is cited locally as *State of Missouri v. Dallas Cox,* No. 08BU-CR02628, and is attached as Appendix A to this Petition. The Opinion of the Western District of the Missouri Court of Appeals pends publishing, cited as *State of Missouri v. Dallas Cox*, No. WD71631 (Mo.App.,2010) and is attached as Appendix B. The order of the Court of Appeals denying Petitioner's Motion for Rehearing En Banc is attached as Appendix C to this Petition. The order of the Supreme Court of Missouri denying transfer of the case is attached as Appendix D to his Petition.

JURISDICTION

The decision of the Court of Appeals was issued on November 2, 2010. The motion for rehearing En Banc was denied on December 21, 2010. The Petition for transfer was denied by the Missouri Supreme Court on January 25, 2011. This Petition

is being filed within 90 days of the denial of transfer by the Missouri Supreme Court.

The jurisdiction of this court is invoked pursuant to 28 U.S.C Sec. 1257(a)

CONSTITUTIONAL PROVISION INVOLVED

This case involves the 14th Amendment to the United States Constitution, which provides, in relevant part: "...nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

The decision below overturned the judgment of the trial court dismissing the criminal prosecution. The trial court made the finding that the State violated the due process clause of the 14th Amendment of the United States Constitution by destroying materially exculpatory evidence essential to the defense of the case.

1. The Criminal Investigation and Hearing on Motion to Dismiss in the Trial Court.

The Defendant Dallas Cox was charged with Murder in the First Degree for allegedly kicking the decedent, Steven Akin, in the head hard enough to cause a slow brain bleed which caused his death several days later.

Prior to the trial of the case, and prior to the Defendant requesting his shoes – the supposed murder weapon which had been seized by the St. Joseph Police Department, the St. Joseph Police Department destroyed all of the physical evidence, including the alleged murder weapon and the decedent's hair and DNA exemplars.

Steven's uncle Kenneth Akin later admitted in a statement to the police (and offered to the trial court at the hearing on this matter) that he alone fought with Steven in his home while Dallas Cox sat outside in his truck. After the fight with his Uncle Kenneth Akin, the deceased Steven Akin made various statements to family members in which he attempted to implicate both his Uncle Kenny Akin and Petitioner Dallas Cox. His statements generally included the description of a fight in which he was getting the better of his uncle, when Dallas Cox kicked him in the head (presumably hard enough to cause a brain bleed), giving his Uncle Kenny Akin a chance to get on top of the fight.

Upon being arrested for investigation just days after the altercation that led to Steven Akin's hospitalization, Dallas Cox gave his shoes to the St. Joseph, Missouri Police Department as evidence. The Police later testified that they recognized that, if Steven Akin's story were accurate, these would be the (at the time) assault weapon (Steven Akin spent several days in intensive care before he died). Following Steven Akin's death, the Police collected from the Medical Examiner samples of Steven Akins's hair, DNA, and fingernail scrapings. At a hearing before the trial court, the Police acknowledged that, if Dallas Cox's shoes were the murder weapon, they

would expect to find on them some trace evidence of the allegedly severe contact with the victim.

The deceased Steve Akin's Uncle Kenneth Akin was arrested and charged with Voluntary Manslaughter. Kenneth Akin made a statement to the police in which he admitted to hitting and kicking his nephew hard enough to kill him. He also denied that Dallas Cox was even in the house at the time of the fight.

Neither the St. Joseph Police Department nor the Buchanan County Prosecuting Attorney's Office ever took any steps to submit the shoes and the various autopsy samples to a laboratory for testing.

Upon learning that no lab work had been ordered by the State, attorneys for the Defendant requested production of the evidence. At this point it was discovered that all of the physical evidence in the case (with exception of the Defendant's cell phone) had been destroyed by the St. Joseph Police Department.

Defendant filed a motion to dismiss the prosecution due to the State's violation of his 14th Amendment right to due process by depriving him of the ability to have a fundamentally fair trial The trial court heard testimony from the investigating officers regarding the course of their investigation. Defendant offered into evidence all of the witness statements collected by the detectives. The detectives admitted under cross examination that if Dallas Cox's shoes were indeed the murder weapons, then they would expect to find some trace evidence from the decedent. The court also heard testimony from the officer in charge of the evidence room that there were absolutely no Standard Operating Procedures for the collection, storage, and destruction of

evidence; there were no written standards whatsoever. The various police witnesses offered speculation about the motives of the now retired and unavailable detective who had been temporarily assigned to the evidence room and, according to their speculation, "mistakenly" destroyed the evidence.

Defendant Dallas Cox argued to the trial court that should the decedent Steven Akin's out of court statements be admitted into evidence against him, it would be impossible to subject his inaccurate statements to the crucible of cross examination. The presentation of the lack of trace evidence on his shoes, the alleged murder weapon, would have directly contradicted the hearsay statement of the unavailable witness. Thus, the State had deprived Defendant Cox of his ability to challenge the story of the unavailable witness, and therefore deprived him of the ability to have a fundamentally fair trial.

After the hearing and the briefing, and having been fully advised of the evidence in the case (the witness statements offered by the defendant were never in any way commented upon or supplemented by the state), the court issued its judgment. The trial court found that the evidence destroyed was materially exculpatory. The court also found that the materially exculpatory nature of the evidence was clear to the investigating officers before it was destroyed. The court finally imputed the knowledge of the investigating officers to the detective temporarily assigned to the evidence room, thus showing bad faith on the part of the police. Based on these findings, the court found a clear violation of Dallas Cox's constitutional right to the due process of law. The court therefore dismissed the prosecution.

2. The Appeal

The State of Missouri appealed. The Western District of the Missouri Court of Appeals reviewed the findings of the Buchanan County Circuit Court and ruled that it abused its discretion in finding that the evidence destroyed was materially exculpatory. Pointing out the seminal evidence destruction opinion of this Court (*Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333 (1988)) resulted in an innocent man spending 8 years in prison for a crime he did not commit, the Court of Appeals compared Dallas Cox's destroyed shoes and the destroyed DNA and hair exemplars of the decedent to the dried and (then) unusable semen in *Youngblood*, which was described by this Court as "merely potentially exculpatory" in that it *could* have been subjected to tests which *might* have proven exculpatory.

The Court of Appeals likewise disapproved of the trial Court's imputation of knowledge from the investigating detectives to the detective temporarily working in the evidence room. The Court of Appeals was not at all interested in the sloppy, reckless lack of procedures and fail-safes employed by the St. Joseph Police Department's evidence room.

Ultimately the Court of Appeals overturned the judgment of the trial court and remanded the case. Defendant Dallas Cox moved for a rehearing en banc, which was denied. He finally sought transfer to the Missouri Supreme Court, which was likewise denied.

REASONS FOR GRANTING THE WRIT

1. Can Destroyed Evidence be Materially Exculpatory?

By overturning the trial court's finding that the destroyed evidence was materially exculpatory, the Missouri Court of Appeals misapplied the standards of this court created in *Illinois v. Fisher*, 540 U.S. 544 and *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333 (1988). Worse, the Missouri Court of Appeals has condemned Defendant Dallas Cox and defendants in his shoes to fundamentally unfair trials due to the misdeeds of the state.

The Missouri Court of Appeals reasoned that, as in *Youngblood*, the most that could be said of the evidence was "that it could have been subjected to tests, the results of which might have exonerated the defendant." *State of Missouri v. Dallas Cox*, No. WD71631 at 7 (Mo.App.,2010) In order to sustain that comparison, the Court of Appeals ignored the findings of the trial court based on the evidence before it. The trial court was aware, first, that the co-defendant Kenneth Akin and the Defendant denied that Defendant Dallas Cox was even in the house where the fight occurred. Further, the Appeals Court ignored the obvious inference that the very reason the state did not send the evidence to a lab in the months before it destroyed the evidence precisely because they knew it would be harmful to the prosecution.

In fact, the Court of Appeals affirmatively stated that "Given the shoes destruction, it cannot be known whether they contained trace evidence..." *Cox* at 7. Thus, the Court of Appeals, relying on this Court's opinions in *Fisher* and *Youngblood*, placed upon the criminal defendant a burden that is logically impossible to meet. They might just as well have said that there is no such thing as a due process violation when evidence is destroyed. And yet, we know that cannot be right.

The Missouri Court of Appeals' decision posits a standard that is impossible to meet. The Court of Appeals, relying on Fisher and Youngblood, essentially posits that destroyed evidence by definition cannot be materially exculpatory

As currently construed, this Court's holdings in Youngblood and Fisher seem to have convinced the lower appellate courts that any trial court would be abusing its discretion if it found that destroyed evidence was materially exculpatory

2. Does "Bad Faith" require a finding of malice?

The Missouri Court of Appeals likewise disapproved of the trial court's finding of bad faith. The Court of Appeals held that the officer who destroyed the evidence was required to have personal knowledge of the value of the evidence for the destruction to have been performed in bad faith.

The trial court had found that the investigating officers were obviously aware of the exculpatory value of the evidence, but that they did not personally have a hand in its destruction. Meanwhile, the

court found that the detective who destroyed the evidence did not have knowledge of its value. Based on the evidence before him, including the reckless lack of Operating Procedures in the St. Joseph, Missouri Police Department Evidence Room, the trial court imputed the knowledge of the investigating detectives to the detective in the evidence room to find bad faith. The Missouri Court of Appeals cited this Court's dicta in *California v. Trombetta*, 467 U.S. 479 (1984), noting that "the record contains no allegation of official animus towards respondents or of a conscious effort to suppress exculpatory evidence." *Trombetta* 467 U.S. at 488.

This Court's dicta in *Youngblood* leaves open to widely varying interpretations what can constitute bad faith. This Court declared an unwillingness to impose on the police "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution" *Youngblood* at 58. This Court intended to limit the police's obligation to preserve evidence "to reasonable bounds and confine(s) it to that class of case where the interests of justice most clearly require it, i.e., those cases where the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." *Ibid.*

The case of the *State of Missouri v. Dallas Cox* presents just such a case – the trial court judge found and believed from the evidence that the police, by seizing the evidence in the first place, by deciding not to have it tested for trace evidence, and for offering explanations the court clearly disbelieved, had evinced their belief that the evidence would have tended to exculpate Dallas Cox. And then the

police intentionally and willfully destroyed that evidence

The Missouri Court of Appeals believed that "the police" must refer specifically to individual officers and that the knowledge of the investigating detectives cannot be imputed to or held against the entire police department, including the evidence room. Unlike the police in *Youngblood*, this was not mere negligence on the part of the police, and this was not merely a "failure to preserve", this was an intentional, volitional, act.

This case presents this issue of national importance and allows this Court the necessary opportunity to clarify the meaning of "bad faith" as it relates to police departments intentionally destroying evidence

3. Justice Stevens' Concurrence and Fundamental Fairness

Defendant Dallas Cox urged the Missouri Court of Appeals to use this unique case to recognize the compelling issues of logic and justice discussed by Justice Stevens in his concurrences in both *Fisher* and *Youngblood* The Missouri Court of Appeals demurred, as it believed it was constrained by the rulings of the Supreme Court of Missouri interpreting the opinions of this Court.

Dallas Cox now urges this court to recognize the national importance and the significance to other defendants similarly deprived by the State of the ability to have a fundamentally fair trial

It is worth remembering that the trial court in this case heard evidence from several witnesses, had before it as exhibits all of the witness statements collected in the case, and had in its possession multiple motions in limine regarding the admissibility of those various statements. The State did not seek to supplement the evidence of the State's case, nor did the state ever suggest that the court was not well advised what the evidence in the case would be.

The court knew that the only evidence in the case tending to incriminate Dallas Cox was contained in the hearsay statements attributed to the decedent Steven Akin. These statements were going to be introduced through his family members. All of the statements included a reference to Dallas Cox kicking him or kicking him in the head.

The court recognized that the witness was not available to be cross-examined. There was no way for the defendant to subject the only witness against him to cross examination (a witness whose testimony would be directly contradicted by the only two available witnesses to the event – Dallas Cox and his co-defendant Kenneth Akin). However, Dallas Cox did have his shoes. The shoes that would have been the murder weapon had he actually been in the fight described by the hearsay statements of the decedent. He turned those shoes over to the police when he was arrested, confident that they would prove him innocent.

Dallas Cox's lawyers knew that the shoes were the only cross-examination of the decedent available. The shoes would contradict a large part of the decedent's story, and thus challenge the accuracy and credibility of his entire story. Without those shoes, Dallas Cox would be left without his only

means of directly challenging the testimony of an unavailable, unsworn witness not subject to cross examination.

In its written opinion, the Missouri Court of Appeals engaged in some argument on behalf of the State about the value of the shoes as evidence In so doing the Court of Appeals ignored the fact that at the evidentiary hearing the police had attempted to make similar arguments which did not stand up under cross-examination. The trial court, who actually observed the cross-examination, simply did not believe the detectives

In any case, the police intentionally and willfully destroyed the shoes and the DNA and hair exemplars after they chose not to do tests, and before Dallas Cox requested them for testing, and long before the trial

It is also worth pondering the likelihood that a criminal defendant would ever be able to produce actual evidence of malicious intent on the part of any police officer or prosecutor. In fact, between the interpretation of lower courts that bad faith means malice and the interpretation by this Court that materially exculpatory means evidence whose worth and value has already been determined and proven extrinsically, criminal defendants faced with destruction of exculpatory evidence are sent on a hunt for unicorns. It is simply not realistic, nay not even possible for a criminal defendant to prove that the destroyed evidence would have been in fact exonerating, once it has been destroyed. The question begs itself And yet, unless this court takes up Justice

Stevens' call to prevent fundamentally unfair trials, that is the impossible task they are left to.

When material, relevant evidence that cannot be replaced is destroyed, one party to the case will suffer a negative impact, and the other party will benefit from the lack of evidence.

It would strain any notion of justice to decide that the innocent party be the one to suffer from the destruction of the evidence. The offending party – the party who destroyed or recklessly allowed evidence to be destroyed - should be the one to suffer the negative impact.

In this particular case, the co-defendant, Kenneth Akins, is serving 15 years in the Missouri Department of Corrections for acting recklessly. It cannot possibly be said that dismissing a case is too drastic a remedy for criminally negligent behavior by the police. Especially when the alternative – the alternative we are left with under the current state of the law – is that the innocent criminal defendant suffers the negative impact and risks going to prison for life for a crime he did not commit.

Justice Stevens in his concurrence in both *Youngblood* and *Fisher* predicted that cases would arise "in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is so critical to the defense as to make a criminal trial fundamentally unfair." *Arizona v. Youngblood,* 488 U.S. 51, 61; 109 S.Ct. 333 (1988) (Stevens, J., concurring) and *Illinois v. Fisher*, 540 U.S. 544, 549 (2004) (Stevens, J., concurring).

This is such a case.

The Missouri Court of Appeals relied heavily

on *Fisher*, which in turn refers to the holding in *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct 1194 (1963), as well as *Youngblood*. It would seem helpful, therefore, to consider the jurisprudential statement at the core of *Brady*.

> "The principal...is not punishment of society for misdeed of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted, but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain. 'The United States wins its point whenever justice is done its citizens in the courts.' A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice, even though, as in the present case, his action is not 'the result of guile...'" *Id* at 87-88

This case cries out for this Court's review Our constitutional mandates for fundamental fairness of criminal trials contained in the due process clause of the 14th Amendment demand it

CONCLUSION

The petition for certiorari should be granted.

Respectfully Submitted,

Eric E. Vernon
Baldwin and Vernon, LLC
11 E. Kansas St.
Liberty, MO 64068
(816) 842-1102
Fax: (816) 842-1102
eric@bvalaw.net
Attorney for Petitioner

APPENDIX

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IN THE CIRCUIT COURT OF BUCHANAN COUNTY, MISSOURI
DIVISION 4

STATE OF MISSOURI,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 08BU-CR02628
	)	
DALLAS COX,	)	
	)	
Defendant.	)	

JUDGMENT SUSTAINING DEFENDANT'S MOTION TO DISMISS

On the 29th day of September, 2009, the parties appeared as follows: Plaintiff State of Missouri by Buchanan County First Assistant Prosecuting Attorney Ronald Holliday and Defendant appeared in person, on bond, and by his attorneys Eric Vernon and Kevin Baldwin. Evidence and arguments were presented on Defendant's Motion to Dismiss or in the alternative Sanctions for Due Process Violation (sic) after which the Court took issue under advisement.

Now on this day of October, 2009, the Court issues the following Findings of Fact and Conclusions of Law

Findings of fact

1. On October 6, 2008, Stephen Akin was assaulted.
2. On October 7, 2008, this assault was reported to the St. Joseph Police Department by Stephen Akin, at which time he informed the police in a written statement he had been assaulted by Kenneth Akin and kicked in the head by Dallas Cox
3 On October 8, 2008, Stephen Akin was hospitalized.
4. On October 9, 2008, Dallas Cox was interviewed by the police, and the following day his shoes were booked into evidence.
5 Subsequent statements were taken from Andrew Akin, Dwight Akin and Gwen Akin in which the victim relayed that Defendant had kicked him in the head.
6. On October 10, 2008, Defendant was charged with the class C felony of Assault in the Second Degree.
7 On October 13, 2008, Stephen Akin died.
8. The autopsy performed by Dr. Mary Dudley, Jackson County Medical Examiner, concluded that Stephen Akin died as a result of blunt force trauma to the head
9 Nail scrapings from Stephen Akin's left and right hands were collected at the au

topsy, as well as head and pubic hair samples and a DNA sample card.

10. On November 24, 2008, Kenneth Akin entered a plea of guilty to Voluntary Manslaughter in the death of Stephen Akin, which specifically did not implicate Defendant.
11. On December 19, 2008, the State filed a First Amended Felony Complaint charging defendant with the Class A Felony of Murder in the Second Degree.
12. On January 5, 2009, Defendant entered a not guilty plea to the Murder charge.
13. On February 5, 2009, Defendant's case was set for jury trial to commence on September 29, 2009.
14. On March 25, 2009, then-Detective Lynn Garland of the St. Joseph Police Department destroyed the above-referenced items of evidence.
15. On August 19, 2009, Defendant's attorneys requested an opportunity to view the physical evidence and review any reports on trace evidence.
16. On September 9, 2009, it was discovered that the evidence had been destroyed.

Conclusions of Law

The issue of the destruction of evidence by police during the pendency of a criminal case was addressed by the United States Supreme Court in *Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333,*

102 L Ed 2d 281 (1988). In that case, the victim's clothes and a rape kit were collected, but nor properly preserved. There the Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law" *Id. 488 U.S. at 58* "The police's obligation to preserve evidence (is limited) to reasonable bounds and (is) confined to...Those cases in which the police by their conduct indicate that the evidence could form a basis for exonerating the defendant" *Id*

This analysis was cited by the Court of Appeals for the Western District of Missouri in *State v. Smith, 157 S W 3d 687 (Mo. App. W.D 2004)* There the Court noted that bad faith turns on law enforcement's "knowledge of the exculpatory value of the evidence at the time it was lost or destroyed". *Id. At 691* (quoting *Youngblood, 488 U.S. at 56*)

The case before the court herein presents the unique situation in which the officer who destroyed the evidence had no direct knowledge of the relative value of the evidence The officers who were aware of the "potential" value, those who collected and booked the evidence, were not a party to the destruction. As stated emphatically by Detective Byron Weed, when questioned as to whether he would have directed or authorized the destruction of the evidence "No, this is a homicide case!"

The issue should not, however, be limited to the knowledge of the officer who destroyed the evidence. The knowledge of the entire department should be imputed to all officers. To hold otherwise would be to lead to the assignment of officers to destroy evidence in cases in which they had no investigatory responsibility.

Further, the only logical inference is that the police were aware of the exculpatory value of the evidence. While they had seized the Defendant's shoes at the time of his arrest, and had collected nail scrapings, head and pubic hair samples and a DNA sample card of the victim at the autopsy, none of these items had been sent off to be tested. Why else were they collected and initially retained?

And while this court recognizes that the State is under no duty to conduct the examinations, there is a duty to preserve. That was not done in this case. Compare this to Youngblood, where the evidence was destroyed after testing. See also *State v. Burns, 112 S.W. 3d 451 (Mo. App. W.D. 2003)*(destroyed evidence available at a previous trial); *State v. Ferguson, 20 S. W. 3d 455 (Mo. Banc 2005)*(evidence destroyed during testing, but lab reports and notes generated and provided).

Given the investigating officers interest in collecting the Defendant's shoes, and the nail scrapings, head and pubic hair samples and a DNA sample card from the victim, this Court is constrained to find that then-Detective Lynn Garland had knowledge of the exculpatory value of the evidence at the time it was destroyed.

Judgment

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Dismiss is sustained.

//s// Judge Daniel F. Kellogg

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI,

APPELLANT,

v.

DALLAS W. COX,

RESPONDENT.

WD71631
FILED: November 2, 2010

Appeal from the Circuit Court of Buchanan County
The Honorable Daniel Fred Kellogg, Judge

Before: Mark D. Pfeiffer, P.J., and Victor C. Howard and Alok Ahuja, JJ.

The State of Missouri appeals the circuit court's dismissal of an information charging Respondent Dallas Cox with murder in the second degree, based on the State's pre-trial destruction of evidence which may have had exculpatory value. We reverse the circuit court's dismissal of the information and remand for further proceedings.

Factual Background[1]

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[1] Our recitation of facts concerning the underlying charges against Cox is solely for purposes of providing necessary background to frame the legal issues presented in this appeal. The description of underlying facts in this opinion should have no effect on any future trial.

On October 6, 2008, Stephen Akin, a resident of St. Joseph, was assaulted. The next day Akin informed the St. Joseph Police Department that the perpetrators were his uncle, Kenneth Akin, and Dallas Cox, a friend of his uncle. Akin stated that Cox had kicked him in the head. On October 8, Stephen Akin was hospitalized for injuries related to the assault.

On October 9, law enforcement officers interviewed and took a statement from Cox. At that time, the officers took possession of the pair of shoes Cox claimed to have been wearing at the time of the assault; the shoes were booked into evidence on October 10.

Akin died on October 13. Following an autopsy the medical examiner concluded that he had died as a result of blunt force trauma to his head. Nail scrapings, head and pubic hair samples, and a DNA sample were collected during Akin's autopsy.

Cox was initially charged with assault in the second degree on October 10, 2008. On November 24, Kenneth Akin pleaded guilty to voluntary manslaughter in connection with Akin's death. Kenneth Akin stated during the plea proceedings, and apparently in other statements, that he had assaulted Akin alone. Nevertheless, on December 19 the State filed a First Amended Felony Complaint charging Cox with felony murder in the second degree, alleging that Cox, "with the purpose of causing serious physical injury to Steven Akin caused the death of Steven Akin by striking him and kicking him in the head." The complaint was superseded by information making the same allegations on December 29. Cox pleaded not guilty, and the case was set for a jury trial to commence on September 29, 2009.

On August 19, 2009, Cox requested an opportunity to view the physical evidence and to review any reports on trace evidence. In response to Cox's request, law enforcement officers discovered that Cox's shoes, the evidence collected during Akin's autopsy, the medical report, and a compact disk containing photographs of Cox's hands and of Akin in the hospital had all been destroyed on March 25, 2009. Based on the evidence log sheets, it appears that the evidence was destroyed by Detective Lynn Garland, who was working in the Police Department's evidence room at the time, but was not involved in the investigation of Akin's murder. The log sheets indicate that the evidence was destroyed as the result of a guilty plea (presumably, Kenneth Akin's guilty plea).

On September 22, 2009, Cox filed a motion to dismiss the charges against him or in the alternative for sanctions.

After receiving a response to the motion to dismiss from the State and conducting an evidentiary hearing,[2] the trial court entered its Judgment Sustaining Motion to Dismiss on October 16, 2009. The court's Judgment states:

> The case before the court herein presents the unique situation in which the officer who destroyed the evidence had no direct knowledge of the relative value of the evidence. The officers who were aware of the "potential" value, those who collected and booked the evi

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[2] Detective Garland did not testify at the evidentiary hearing.

> dence, were not a party to the destruction. As stated emphatically by Detective Byron Weed[, one of the detectives who investigated Akin's murder], when questioned as to whether he would have directed or authorized the destruction of the evidence, "No; this is a homicide case!"

Although the court found that Detective Garland, the officer who actually destroyed the evidence, had no knowledge of its potentially exculpatory value, the court concluded that "[t]he knowledge of the entire department should be imputed to all officers," because "[t]o hold otherwise would be to lead to the assignment of officers to destroy evidence in cases in which they had no other investigatory responsibility."

The Judgment also concludes that the investigating officers knew that the destroyed evidence had exculpatory value, and that this knowledge must be attributed to Detective Garland:

> [T]he only logical inference is that the police were aware of the exculpatory value of the evidence. While they had seized the Defendant's shoes at the time of his arrest, and had collected nail scrapings, head and pubic hair samples and a DNA sample card of the victim at the autopsy, none of these items had been sent off to be tested. Why else

> were they collected and initially retained? . . . Given the investigating of
>
> ficers' interest in collecting the Defendant's shoes, and the [other destroyed evidence], this Court is constrained to find that then-Detective Lynn Garland had knowledge of the exculpatory value of the evidence at the time it was destroyed.

The State appeals.

Analysis

The State argues that the circuit court erred in dismissing the information against Cox, because the police lacked knowledge of the exculpatory value of the evidence and did not act in bad faith in destroying it We agree

We review a circuit court's ruling on a motion to dismiss a charging instrument for an abuse of discretion *State v. Berwald*, 186 S.W.3d 349, 366 (Mo. App. W D 2005) (citing *State v Burns*, 112 S W 3d 451, 454 (Mo. App W.D. 2003))

The Judgment dismissed the charges against Cox based solely on a purported violation of the Due Process Clause contained in the Fourteenth Amendment to the United States Constitution. Cox's due process claim implicates "'what might loosely be called the area of constitutionally guaranteed access to evidence " *Arizona v Youngblood*, 488 U S 51, 55 (1988) (citation omitted). The standards governing such claims depends on the nature of the evidence the State has destroyed

> [W]hen the State suppresses or fails to disclose material exculpatory evidence, the good or bad faith of the prosecution is irrelevant: a due process violation occurs whenever such evidence is withheld. In *Youngblood*, by contrast, we recognized that the Due Process Clause "requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." 488 U.S., at 57. We concluded that the failure to preserve this "potentially useful evidence" does not violate due process "*unless a criminal defendant can show bad faith on the part of the police.*" *Id.*, at 58 (emphasis added).

Illinois v. Fisher, 540 U.S. 544, 547-48 (2004) (other citations omitted).

For evidence to qualify as "materially exculpatory," "the evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *California v. Trombetta*, 467 U.S. 479, 489 (1984). If the evidence fails to meet this two-pronged test, then the evidence is, at most, only "potentially useful," and a showing of bad faith is necessary to substantiate a due

process claim based on the State's destruction of the evidence *Fisher*, 540 U.S. at 548.

In light of the United States Supreme Court's decision in *Youngblood*, the evidence at issue in this case cannot be considered "materially exculpatory." *Youngblood* was a prosecution for child molestation, sexual assault, and kidnapping. 488 U.S. at 53 After the assault, the authorities collected biological samples from the ten-year-old victim's mouth and rectum, and also collected the victim's underwear and T-shirt, which were later found to contain semen stains. *Id.* By the time of the defendant's trial, the biological samples had degraded due to lack of refrigeration, and could not be tested using then-available technology *Id.* at 54

Although the evidence at issue in *Youngblood* would presumably have identified the actual perpetrator of the sexual assault, the Supreme Court held that the exculpatory value of the biological material was not "apparent" at the time it was destroyed within the meaning of *Trombetta*, because it was unknown what testing of the evidence would reveal.

> In this case, the Arizona Court of Appeals [held] . . . that "'when identity is an issue at trial and the police permit destruction of evidence that *could eliminate* a defendant as the perpetrator, such loss is material to the defense and is a denial of due process.'" Th[is] reasoning . . mark[s] a sharp departure from *Trombetta* in two respects First, *Trombetta* speaks of evidence whose ex

> culpatory value is "apparent." 467 U.S., at 489. The possibility that the semen samples could have exculpated respondent if preserved or tested is not enough to satisfy the standard of constitutional materiality in *Trombetta*. Second, we made clear in *Trombetta* that the exculpatory value of the evidence must be apparent "*before* the evidence was destroyed." *Ibid.* (emphasis added). Here, respondent has not shown that the police knew the semen samples would have exculpated him when they failed to perform certain tests or to refrigerate the boy's clothing; this evidence was simply an avenue of investigation that might have led in any number of directions.

488 U.S. at 56 n.*. *Youngblood* recognized that "the good or bad faith of the State [is] irrelevant when the State fails to disclose to the defendant material exculpatory evidence." *Id.* at 57. The Court nevertheless held that a showing of bad faith was required in the case before it, because it was dealing "with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Id.*

Missouri courts following *Youngblood* have recognized that a showing of bad faith by the State is necessary where it can only be said that destroyed evidence *might* have exculpated a defendant. *See also, e.g., State v. Ferguson*, 20 S.W.3d 485, 504 (Mo banc 2000) (destruction of surveillance videotape made on night of victim's abduction); *State v. McElvain*, 228 S.W.3d 592, 598 (Mo. App. W.D. 2007) (officers failed to preserve material believed to be anhydrous ammonia, which defendant was accused of stealing); *State v. Berwald*, 186 S.W.3d 349, 366-67 (Mo. App. W.D. 2005) (failure to preserve audiotape of child victim's initial recounting of sexual abuse allegations to victim's mother), *State v. Smith*, 157 S.W.3d 687, 691 (Mo. App. W.D. 2004) (police failed to preserve chemicals found in alleged methamphetamine laboratory); *State v. Burns*, 112 S.W.3d 451, 454-55 (Mo. App. W.D. 2003) (failure to preserve physical evidence from victim and from crime scene, and clothing defendant wore on night of sexual assault) [3]

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[3] Cox asks us to follow the decisions of courts in other States which have adopted the approach advocated by Justice Stevens in a concurring opinion in *Youngblood*, which argued that "there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair." 488 U.S. at 61. Whatever its merits, however, we are precluded from adopting this approach by the Missouri Supreme Court's opinion in *Ferguson*, which states unambiguously that "[a]bsent a showing of bad faith on the part of the police or prosecutor, the failure to preserve even potentially useful evidence does not constitute a denial of due process." 20 S.W.3d at 504. We also note that the approach Justice Stevens proposed in *Youngblood* may also have been rejected at least

Under *Youngblood*, the evidence destroyed in this case cannot be deemed "materially exculpatory." As in *Youngblood*, "no more can be said" of the shoes "than that [they] could have been subjected to tests, the results of which might have exonerated the defendant." 488 U.S. at 57.[4] Given the shoes' destruction, it cannot be known whether they contained trace evidence which would have inculpated Cox, or whether testing of the shoes would have revealed no such evidence and assisted in his defense of the second-degree murder charge. Significantly, the evidence destroyed in this case has *less* potential probative value than in *Youngblood*. In *Youngblood* it appears that the identity of the perpetrator of the sexual assault could be conclusively determined by testing the biological materials which police had allowed to become degraded and untestable.[5] Here, by contrast, *even if* the shoes had been tested and revealed no trace evidence connecting them to the assault on Akin, this would not neces

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as a matter of *federal* law, by the passage in *Fisher* which we quote below

[4] Although the evidence which was destroyed in this case includes other items in addition to Cox's shoes, Cox's arguments focus on the potential exculpatory value of the shoes, and we do likewise.

[5] Notably, Youngblood was exonerated twelve years later, based on more sophisticated DNA testing of the evidence at issue in the Supreme Court's decision Barbara Whitaker, *DNA Frees Inmate Years after Justices Rejected Plea*, N Y TIMES (Aug 11, 2000)

sarily have eliminated Cox as a perpetrator of the assault. Cox may have been wearing different shoes at the time of the assault, Cox may have kicked Akin in the head without any detectable trace evidence having been deposited on the shoes; Cox may have cleaned the shoes between the time of the assault and when they were collected by police, or Cox may have been involved in the assault along with Kenneth Akin, without actually being the one who *kicked* Akin

We recognize that the shoes that were destroyed here would have been of central significance in Cox's trial if they had been preserved, whether they tended to implicate or absolve him of the crime. However, *Fisher* holds that the potential importance of the evidence to the prosecution's case, or to the presentation of a vigorous defense, is not a relevant consideration:

> We . disagree that *Youngblood* does not apply whenever the contested evidence provides a defendant's "only hope for exoneration" and is "'essential to and determinative of the outcome of the case.'" In *Youngblood*, the Arizona Court of Appeals said that the destroyed evidence "could [have] eliminate[d] the defendant as the perpetrator" 488 U S., at 54 (quotation marks and citations omitted) . [T]he applicability of the bad-faith requirement in *Youngblood* depended not on the centrality of the contested evidence to the

> prosecution's case or the defendant's defense, but on the distinction between "material exculpatory" evidence and "potentially useful" evidence. 488 U.S., at 57-58. As we have held, the substance destroyed here was, at best, "potentially useful" evidence, and therefore *Youngblood*'s bad-faith requirement applies.

540 U.S. at 548-49 (other citations omitted).[6]

Because the evidence at issue here is only *potentially* exculpatory, Cox was required to show that the evidence was destroyed by the police in bad faith. "In this context, bad faith is the destruction of evidence by a state actor 'for the purpose of depriving the defendant of exculpatory evidence.'" *Berwald*, 186 S.W.3d at 366-67 (quoting *State v. Armentrout*, 8 S.W.3d 99, 110 (Mo. banc 1999)); *McElvain*, 228 S.W.3d at 598; *see also Trombetta*, 467 U.S. at 488

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[6] The trial court's Judgment concludes that the investigating officers were aware of the exculpatory value of the destroyed evidence because that evidence was collected, but then not tested. We do not believe these circumstances can support an inference that the destroyed evidence was "materially exculpatory," however While the police's collection of certain evidence may indicate an awareness that the evidence is *potentially* exculpatory, law enforcement's decision to collect particular evidence is equally consistent with a belief that the evidence will prove to be *in*culpatory Similarly, the failure to test the evidence supports, at best, an inference that the police were aware of the evidence's *potentially* exculpatory value

(in finding an absence of bad faith, noting that "[t]he record contains no allegation of official animus towards respondents or of a conscious effort to suppress exculpatory evidence")

We believe the Judgment forecloses any finding of bad faith under the standards we must apply In its Judgment, the circuit court found that the officers who were actually aware of the potential significance of the destroyed evidence "were not a party to the destruction." and would not have authorized its destruction. Conversely, the court found that the officer who destroyed the evidence "had no direct knowledge of the relative value of the evidence." Given these findings, no conclusion that the police acted in bad faith is possible. in order to act with "the purpose of depriving the defendant of exculpatory evidence," the individuals destroying that evidence must, at a minimum, have some knowledge that evidence is important to a pending criminal prosecution

We recognize that the trial court imputed the investigating officers' knowledge of the significance of the destroyed evidence to Detective Garland, the officer who destroyed it But such imputation cannot establish bad faith in this case The act of destruction by an officer with no purpose to deprive Cox of potentially exculpatory evidence, and the knowledge of the evidence's significance held by other officers who possessed no intent or desire to have the evidence destroyed, cannot be combined to supply the

missing ingredient: official animus towards Cox or a purpose to deprive him of the evidence.[7]

Cox argues that there are numerous circumstances in this case that could support a finding of bad faith. Detective Garland's destruction of the evidence was apparently contrary to the unwritten policy of the St. Joseph Police Department, which was to destroy evidence only in response to a court order, and not to destroy evidence in homicide cases.[8] Detective Garland may also have acted contrary to the instructions he had received from the officer in charge of the evidence room, to focus only on cases older than Akin's 2008 homicide. Further, unresolved questions exist as to *why* Detective

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[7] The circuit court expressed concern that the police could insulate the destruction of evidence from due process review by intentionally having evidence destroyed by officers ignorant of the evidence's significance But we believe such a situation can be addressed under existing law Law enforcement officers involved in a criminal investigation who ask an unknowing colleague to destroy potentially useful evidence, in order to deprive the defendant of access to that evidence, have acted in bad faith, whether they destroy the evidence directly or through an agent That is not the situation here

[8] In this connection, *see* § 542.301, RSMo Cum. Supp. 2009 (statute governing disposition of unclaimed seized property), *State ex rel Nixon v Russell*, 45 S W.3d 487, 500-01 (Mo App. W D. 2001) (affirming trial court's conclusion that sheriff's disposition of unclaimed seized property in violation of § 542 301 "constitutes a willful neglect of his duty as sheriff," supporting sheriff's ouster from office, although sheriff testified that he was unaware of the statute's requirements)

Garland chose to destroy the evidence, apparently based on Kenneth Akin's guilty plea, when the evidence log sheets did not name Kenneth Akin, but identified only Cox as being associated with the evidence.

While these circumstances arguably *could have* supported a finding of bad faith, the trial court failed to cite to these circumstances in its decision, and as we have explained above, any conclusion that Detective Garland acted in bad faith is foreclosed by the trial court's explicit finding that he acted without knowledge of the evidence's significance, and its finding that the officers with relevant knowledge were uninvolved in the destruction of the evidence, and would not have authorized it.

Conclusion

We reverse the trial court's dismissal of the charges against Cox and remand for further proceedings consistent with this opinion [9]

//s// Alok Ahuja, Judge

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[9] We emphasize that we have addressed in this appeal only the trial court's decision to dismiss the charges based on due process access-to-evidence principles. The trial court on remand is free to consider other legal arguments concerning the State's destruction of the evidence at issue, and the appropriate remedy under any other legal theory

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DECEMBER 21, 2010

IMPORTANT NOTICE

TO: ALL ATTORNEYS OF RECORD

RE: STATE OF MISSOURI, APPELLANT

VS.

DALLAS W. COX, RESPONDENT

WD71631

Please be advised that Respondent's motion for Rehearing is **OVERRULED** and motion for transfer to Supreme Court is **DENIED**. See Rule 83.04.

Terence G. Lord
Clerk

cc: TERRENCE MICHAEL MESSONNIER(573) 751-5391
ERIC EUGENE VERNON (816) 842-1104

IN THE SUPREME COURT OF MISSOURI

SC91423
WD71631

JANUARY SESSION, 2011

State of Missouri,
Appellant,

Vs. (TRANSFER)

Dallas W Cox,
Respondent

Now at this day, on consideration of the respondent's application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas F Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record

at the January Session, 2011, and on the 25th day of January, 2011, in the above-entitled cause.

Given under my hand and seal of
Said Court, at the City of Jefferson,
This 25th day of January, 2011.

_____Clerk

_____D.C.

14th AMENDMENT OF THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws